Supreme Court, U.S.
FILED
05-289 AUG 31 2005
OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

TIMOTHY J. MILES,
Petitioner,

v.

H-QUOTIENT, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. YORK
Counsel of Record
WEHNER & YORK, P.C.
11860 Sunrise Valley Drive
Suite 100
Reston, Virginia 20191
(703) 476-8000

QUESTIONS PRESENTED

1. Whether a district court's remand order pursuant to the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb, must be reviewable by a federal court in order to effectuate Congress's plan for a uniform, federal forum for certain state-law class actions.

2. Whether Congress, in completely preempting state-law class actions asserting securities fraud claims, conferred subject-matter jurisdiction upon district courts *ab initio*, thus requiring that remand orders in such cases be reviewable by a federal court.

PARTIES TO THE PROCEEDING

Petitioner is Timothy J. Miles, an individual not related to any publicly held or publicly traded company. Respondent is H-Quotient, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Timothy J. Miles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, Case No. 05-1120, dated June 8, 2005, dismissing petitioner's appeal of the district court order of remand. The case involves state-law securities claims completely preempted by the Securities Litigation Uniform Standards Act of 1998 (SLUSA) 15 U.S.C. §§ 77p, 78bb.

OPINIONS BELOW

The June 8, 2005, order of the court of appeals (Pet. App. *infra* 1a) is unreported. The district court's order remanding the claims to state court is unreported (Pet. App. *infra* 2).

JURISDICTION

The certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

1. The Securities Litigation Uniform Standards Act of 1998 (SLUSA) completely preempts certain state-law class actions involving securities fraud claims. 15 U.S.C. §§ 77p, 78bb. The pertinent provisions are set forth in an appendix to this petition (Pet. App. *infra* 3a).

2. The Private Securities Litigation Reform Act of 1995 (PSLRA) substantially raised the pleading standards for securities fraud claims in federal court above those set forth in Rule 9(b) of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4 *et seq.* (1995) The pertinent provisions are set forth in an appendix to this petition (Pet. App. *infra* 13a).

STATEMENT

This case involves the scope and implications of complete federal preemption and Congress's power to divest state courts of all jurisdiction over certain claims. In 1998, Congress determined that widespread abuse of class-action claims based on alleged securities fraud required a dramatic,

and some would say,[1] extreme federal solution. H. R. Rep. No. 105-640, at 10 (1998).

Three years earlier, Congress sought to address the problem by enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), which imposed stringent pleading and proof requirements for certain class actions. 15 U.S.C. § 78u-4 *et seq.* (1995).

Almost immediately, Congress determined that creative lawyers could avoid those requirements by pleading only state-law claims. S. Rep. No. 105-182, at 3-4 (1998). In response, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA), making it plain that all such claims must be resolved by a federal court. 15 U.S.C. §§ 77p, 78bb.

In SLUSA, Congress set forth a straightforward procedure to effectuate its intent. State claims of securities fraud asserted on behalf of more than 50 persons are to be removed to federal court and then dismissed. Thus, the crucial step in the process is the district court's determination of whether the removed claims are of the type Congress intended to completely preempt. 15 U.S.C. § 77p.

The Second and Ninth Circuits have held that SLUSA remands are not reviewable by circuit courts. The Seventh Circuit has held that appellate review of these district court remand orders is not only permissible, but required. Reviewability is necessary, the Seventh Circuit reasoned, to carry out Congress's intent to completely preempt federal securities law claims. *Kircher v. Putnam Funds Trust,* 373 F.3d 847 (2004).

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[1] An excellent scholarly review of SLUSA explores the complete preemption doctrine. However, the author does not extend that analysis to the issue of reviewability of remand orders. Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?* 56 Ala. L. Rev. 325 (2004).

All of the policy considerations and procedural issues noted in these court of appeals decisions are present in this case.

This case is a SLAPP suit, or a Strategic Lawsuit Against Public Participation. The respondent, H-Quotient, Inc., filed this lawsuit against petitioner Timothy J. Miles in the Fairfax, Virginia, Circuit Court on November 7, 2003, asserting state-law claims of defamation and securities fraud. At that time, the petitioner operated the Web site Our-Street.com, which he characterized as a crusading bulletin board of information about corporate greed and dishonesty.

Respondent has asserted claims for securities fraud, based upon allegations of reliance by its shareholders and others. H-Quotient expressly disclaims that it relied on any allegedly false statements by Miles. Respondent seeks to recover for losses incurred by its various shareholders from their purchases and sales of H-Quotient stock. The shareholders entered into the stock transactions, respondent maintains, relying upon statements published on petitioner's Web site. Respondent seeks to recover $2 million in damages, which it would presumably distribute to its shareholders.

Petitioner removed this case to the United States District Court for the Eastern District of Virginia, stating in its Notice of Removal that the respondent's securities fraud claims were completely preempted and that Congress had established a mechanism for such state-law claims to be removed to federal court and then dismissed.

Petitioner submitted that SLUSA was applicable to the claims because they met the two chief requirements for preemption. First, the claims were asserted on behalf of more than 50 persons, and thus constituted a "covered class action" under the Act's definition of that term.[2] Second, the claims related to the purchase or sale of a "covered security."

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[2] The definition of a class action contained in SLUSA is substantially broader than that of FED. R. CIV. P. 23. See 15 U.S.C. § 77p(f)(2)(A).

The respondent did not seriously dispute that its fraud claims related to transactions involving a covered security, but argued that, the language of its complaint notwithstanding, it sought to recover only for its own losses from its own stock transactions. On January 24, 2005, the district court ruled that the respondent's complaint did not satisfy the "covered class action" requirement of SLUSA and ordered the case remanded to state court (Pet. App. *infra* 2).

Miles sought a review of the district court's order, and on June 8, 2005, the Fourth Circuit issued a one-paragraph order dismissing the appeal. The order did not state the basis for the Court's ruling. A copy of the order is attached in an appendix to this petition (Pet. App. *infra* 1).

REASONS FOR GRANTING THE PETITION

Petitioner seeks a writ of certiorari to resolve a split among the circuits regarding an important issue – the scope of complete federal preemption in the context of SLUSA remands.

Petitioner submits that the procedural posture of this case provides an appropriate opportunity for the Court to decide this issue.

A. *There is a Circuit Split on the Issue of Reviewability of SLUSA Remands*

Supreme Court Rule 10(a) states that when granting certiorari, this Court will consider whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

Three circuits, the Second, Seventh and Ninth Circuits, have issued conflicting opinions on the reviewability of

SLUSA remands.[3] The Seventh Circuit, acknowledging the conflict with other circuits, decided that appellate review of remand orders under SLUSA is required. *Kircher,* 373 F.3d at 851. The Seventh Circuit observed that what the district court termed a "lack of subject-matter jurisdiction" was in truth an erroneous finding that SLUSA was not applicable to plaintiffs' claims. The Seventh Circuit then applied the Act's language and the underlying Congressional intent to the facts and determined that the remand order must be reviewable. *Kircher*, 373 F.3d at 849. That court explained that SLUSA remands must be reviewed by the circuit court in light of Congress's express intent to completely preempt state-law securities claims of this type. See *Kircher*, 373 F.3d at 849.

In contrast, the Second and Ninth Circuits ruled that 28 U.S.C. § 1447(d) stands as an absolute bar to judicial review of a SLUSA remand. However, neither circuit reconciled Congress's express intent to completely preempt state-law securities fraud claims asserted as class actions in the context of reviewing remand orders, and treated the matter as a normal preemption claim to be determined by the state courts. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004).

The Seventh Circuit noted that the Second and Ninth Circuit decisions in *Spielman* and *United Investors Life Insurance Co.*, respectively, were inconsistent with this Court's holdings in *Scarborough v. Principi,* 541 U.S. 401 (2004), and *Kontrick v. Ryan,* 540 U.S. 443 (2004). In *Kontrick*, this Court stated that "[o]nly Congress may determine a lower federal court's subject matter

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[3] In addition, the Third Circuit, in *Rowinski v. Salomon Smith Barney Inc.*, 348 F. 3rd 294, 298 (3d Cir. 2005), has taken note of the split. Because *Rowinski* dealt with the review of a decision in which the district court denied a motion to remand, the Third Circuit did not address the issue of reviewability.

jurisdiction." *Kontrick*, 540 U.S. at 452 (citing U.S. Const., Art. III, § 1).

Unlike instances of differing statutory interpretations among the circuits, this split will do more than require parties to alter their pleading and proof to conform to a particular circuit's standard. This split will result in judicial review for certain class-action securities fraud cases and a remand to state court for essentially identical cases filed elsewhere. Such a result would frustrate Congress's plan of uniform, federal standards for adjudicating class-action securities claims.

For those remanded cases, such as this one, defendants could lose the protection against frivolous lawsuits Congress intended to provide by enacting SLUSA. Inevitably, plaintiffs' lawyers will quickly learn that otherwise preempted class-action lawsuits must be filed outside federal circuits that follow the Seventh Circuit's lead.

B. *The Procedural Posture in this Case Makes it Particularly Appropriate For Supreme Court Review*

The court of appeals dismissed this case solely on the issue of jurisdiction (Pet. App. *infra.* 1a). The district court's order was based on a finding that the securities fraud claim contained in the amended complaint did not assert a cause of action on behalf of more than 50 persons (Pet. App. *infra* 2a). Accordingly, the only issue to be resolved is whether such district court orders are reviewable in light of SLUSA's complete preemption of securities fraud class-action claims.

1. *The Court of Appeals Order is a Final Judgment Based Solely on the Issue of Reviewability*

The Fourth Circuit dismissed petitioner's appeal on June, 8, 2005, and denied petitioner's application for a stay of mandate pending certiorari on June 20, 2005. This is a final decision, appealable under 28 U.S.C. § 1291. *Kircher*, 373 F.3d at 848.

2. *The Fourth Circuit Apparently Based its Decision on a Determination that it Lacked Jurisdiction*

The Fourth Circuit declined to rule on petitioner's appeal and review the threshold SLUSA determination by the district court.

The district court did not set forth its rationale for determining that the respondent's claim does not fall under the "covered class-action" requirement.

There is no provision for class-action lawsuits in Virginia state courts. While threshold SLUSA determinations are uniquely suitable for federal court review, such review is especially important where, as here, the remand would be to a jurisdiction without developed case law involving class actions or aggregated claims.[4]

Congress's broadened definition of "class action" in SLUSA demonstrates its intent to cover a wide range of

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[4] Congress broadened the traditional definition of "class action" to include "any group of lawsuits that are filed or pending in the same court, that in the aggregate seek damages on behalf of more than fifty persons, and that involve common questions of law or fact, which are joined, consolidated, or otherwise proceed as a single action for any purpose." S. Rep. No. 105-182, at 7 (1998). The proponents of SLUSA justified this broader definition as a measure to prevent plaintiffs from evading the requirements of PSLRA. S. Rep. No. 105-182, at 8 (1998). Opponents of the definition said the Act's language was overly broad and posed a threat to investors. S. Rep. No. 105-182, at 19 (1998). Proponents of the broadened definition prevailed.

suits, a compelling reason why the district court's order requires federal appellate review.

C. *The Doctrine of Complete Federal Preemption Renders 28 U.S.C. § 1447(d) Inapplicable and Requires Uniform Application in all Federal Circuits*

In SLUSA, Congress created a purely federal forum, thereby conferring exclusive subject-matter jurisdiction over certain "covered class actions" upon district courts. H.R. Rep.No. 105-803, 2 (1998).

SLUSA's provisions were intended to close the "federal flight" loophole left in PSLRA. H. R. Rep. No. 105-803, 2 (1998). Under the doctrine of complete preemption, not only does the state claim cease to exist, but the state court is arguably divested of jurisdiction to determine whether the claim is preempted. That role is solely within the province of federal court.

The Second and Ninth Circuits' interpretation of Section 1447 undermines the congressional intent to create a purely federal forum under SLUSA. This Court has recognized that Section 1447 is not all-encompasing and that only cases covered under that provision are barred from review. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976).

Additionally, the Second and Ninth Circuits' interpretation of the relationship between SLUSA and Section 1447 contradicts this Court's holding in *Kontrick* that Congress, not the courts, determines the subject matter jurisdiction of lower federal courts. *Kontrick*, 540 U.S. at 452. In this case, the remand was made pursuant to SLUSA, rather than Section 1447, and it follows that congressional intent should control the forum in which these decisions are reviewed.[5]

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[5] The follow-up case to *Thermtron*, *Things Remembered Inc.*, which applied the *Thermtron* principle to other statutes, is inapplicable because

A review of SLUSA'S legislative history shows that Congress intended that claims covered by the Act be completely preempted and litigated solely in a federal forum. The conference committee listed in its findings: "[I]t is appropriate to enact national standards for securities class-action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of the State securities regulators and not changing the current treatment of individual lawsuits." H. R. Rep. No. 105-803, at 2 (1998).

Indeed, Congress was so concerned about federal flight due to PSLRA, that it determined, "The solution to this problem is to make Federal court the exclusive venue for securities fraud class-action litigation." H. R. Rep. No. 105-640, at 10 (1998).

Accordingly, Congress carved out a set of claims that require a purely federal forum, and it conferred subject-matter jurisdiction on federal district courts for those class actions. H. R. Rep. No. 105-803, at 15 (1998). Congress intended that covered class-action securities claims be litigated only in federal court, where litigants must comply with stringent requirements of PSLRA. H. R. Rep. No. 105-803, at 2 (1998).

In this regard, it is instructive to note that the Seventh Circuit ultimately proceeded to review the merits of the appeal in *Kircher*, and ultimately reversed the district court's remand order. *Kircher v. Putnam Funds Trust.*, 403 F.3d 478 (7th Cir. 2005) (*Kircher II*).

The district court had determined that SLUSA did not apply, but the Seventh Circuit held that the lower court erroneously concluded that the claims did not involve a "covered security" as defined by SLUSA. *Kircher II*, 403 F.3d at 483, 484.

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the bankruptcy statute expressly barred review of the remand order. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995).

This sort of appellate review is consistent with Congress's scheme for a purely federal form for these claims.[6]

CONCLUSION

For the foregoing reason, petitioner Timothy J. Miles respectfully asks the court to grant a writ of certiorari.

Respectfully Submitted,

MICHAEL M. YORK
WEHNER & YORK, P.C.
11860 Sunrise Valley Drive
Suite 100
Reston, Virginia 20191
Telephone: (703) 476-8000
Facsimile: (703) 476-8300
Attorney for Petitioner

AUGUST 2005

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[6] In a recently decided case, the Seventh Circuit has again reviewed, and reversed, a SLUSA remand order. *Disher v. Citigroup Global Markets Inc.*, 2005 U.S. App. LEXIS 17334 (7th Cir. Aug. 17, 2005).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2220

H-QUOTIENT, INCORPORATED,
APPELLEE,

v.

TIMOTHY MILES, T/A OUR-STREET.COM,
APPELLANT.

On Appeal From the United States District Court For
The Eastern District of Virginia

[Filed: June 8, 2005]

ORDER

Appellee has filed a motion to dismiss, and appellant has filed a response. The Court grants the motion. Entered at the discretion of Judge Luttig with the concurrence of Judge Traxler and Judge Niemeyer.

For the Court,
/s/ Patricia S. Connor

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. 04-01449

H-QUOTIENT, INC.,
PLAINTIFF,

v.

TIMOTHY MILES, T/A OUR-STREET.COM,
DEFENDANT.

[Filed: January 24, 2005]

ORDER

THIS MATTER is before the court on Plaintiff's Motion to Remand this action to state court and accompanying motion by the Defendant to disqualify Plaintiff's counsel. This case concerns allegations of libel and slander. Plaintiff H-Quotient, Inc. (HQ) claims that the Defendant, Timothy J. Miles (Miles) made false and misleading statements about HQ and published them on his website and via press release. The issues before the court are three-fold. First, whether or not this court has subject matter jurisdiction over the claim

pursuant to § 77p of the Securities Litigation Uniform Standards Act of 1998 (SLUSA) where the Plaintiff's claim alleges that statements made by the Defendant were relied on by stockholders, potential creditors and future business partners, which in turn was detrimental to the plaintiff. Second, whether Defendant's Notice of Removal to this court was filed in a timely fashion pursuant to 28 U.S.C. § 1446 (b) when it was filed 391 days after the Notice of Removal was filed. Finally, whether or not Plaintiff's counsel violated Rules 4.1, 4.3, 4.4 and 8.4 of the Virginia Rules of Professional Conduct, warranting disqualification from this case pursuant to Rule 83 of the Federal Rules of Civil Procedure, for obtaining the medical records of the Defendant's wife without her permission and placing them in a public file. See Fed. R. Civ. P. 83 (b). The Court grants the Plaintiff's Motion to Remand because the Court does not have subject matter jurisdiction over the claim pursuant to § 77p of SLUSA.

BACKGROUND

Plaintiff is a corporation duly organized under the existing laws of the Commonwealth of Virginia with its principle place of business in Vienna, VA. Defendant, through his unincorporated business, Our- reet.com, provides financial stock forecast information to subscribers about publicly traded companies, like HQ, a few days before releasing the information to the public via press release. Plaintiff originally brought this complaint in Fairfax County Circuit Court on November 7, 2003. On November 5, 2004, the Fairfax County Circuit Court Judge granted Defendant's demurrer as to the two fraud claims in the Plaintiff's initial complaint, leading to the submission of an amended complaint on November 30, 2004. Plaintiff alleged in the

amended complaint that the statements made by the Defendant were false, misleading and defamatory and published with the sole intention of decreasing the market value of HQ's stock. Plaintiff also alleged that the general public, future business partners and reluctant creditors had relied on Defendant's faulty assertions to the detriment of the Plaintiff. This prompted Defendant to remove the case to this Court alleging that the Plaintiff was seeking "damages on behalf of the corporate plaintiff, as well as its shareholders, creditors and others," and that such claims were preempted in state court under SLUSA. Def. Not. of Removal at 5; 15 U.S.C. § 77p (c). Plaintiff now seeks to remand the case back to the Fairfax County Circuit Court. Following Plaintiff's Motion to Remand, Defendant alleged that Plaintiff illegally obtained the private medical records of the wife of the Defendant and made that information part of public record by attaching it to a filing in the Fairfax County Circuit Court. Plaintiff seeks to disqualify defense counsel from the case for failing to adhere to the Virginia Rules of Professional Conduct.

DISCUSSION

A. Standard of Review

"If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, that case shall be remanded." 28 U.S.C. § 1447 (c). "An order remanding the case may require a payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal." *Id.*

"In an action that has been removed from a State court pursuant to subsection (c), if the Federal Court maintains that the action may be maintained in State Court, the Federal

court shall remand such action to State Court." 15 U.S.C. § 77p (d) (4). This standard of review sets forth the procedural framework for the court's analysis; each subsection contains the rule of law that applies to each individual claim.

B. Analysis:

i. Subject Matter Jurisdiction

The Court holds that it does not have subject matter jurisdiction over this claim under SLUSA. In order to qualify as a "covered class action" under SLUSA and remove a State claim to Federal court, Plaintiff's complaint would have to be brought seeking damages on behalf of more than fifty persons with questions of law or fact common to those persons or one or more named parties would have to seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated. 15 U.S.C. § 77p (f) (2) (A) (i) (I-II) .

Plaintiff's complaint seeks no such collective remedy. Plaintiff's complaint stated that allegedly false comments made by the Defendant were "relied on by the Plaintiff's shareholders, creditors, potential business partners and the general public, which are in turn detrimental to the Plaintiff's ability to Conduct it's business affairs." Pl.'s Am. Bill of Compl. at 28. This assertion constitutes the reliance element of the common law claim for fraud, and this statement is not an attempt to recover damages in a group or representative fashion. *See generally Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.*, 256 Va. 553, 557-58 (1998) (enumerating the

common law elements of fraud as: "(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, (6) resulting damage to the party"). The Plaintiff's Amended Bill of Complaint pleads fraud and reliance on the part of others. The Amended Bill of Complaint does not seek damages on behalf of any third party, thus the claim does not fall under SLUSA and this Court does not have subject matter jurisdiction.

ii. **Timeliness**

The Court holds that Defendant's Notice of Removal from Fairfax County Circuit Court to the United States District Court for the Eastern District of Virginia, Alexandria Division was filed in a timely fashion. "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant...of the initial pleading setting forth the claim for relief upon which such claim is based. " 28 U.S.C. § 1446 (b). However, "(i)f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days of receipt by the defendant...of a copy of an amended pleading...from which it may first be ascertained that the case is one which is or has become removable." *Id.*

Plaintiff contends that Defendant's filing of Notice of Removal was in violation of the timeliness provision of 28 U.S.C. § 1446 (b) because it was filed 391 days after the initial complaint. The Notice of Removal was filed less that 30 days after Plaintiff

filed an Amended Bill of Complaint. As the Defendant based its Notice of Removal on the changes in Plaintiff's Amended Bill of Complaint, the Notice of Renewal was timely.

iii. Disqualification of Opposition Counsel

The Court holds that the issue of the disqualification of Plaintiff's counsel should also be remanded to State court. The ethical standards pertaining to civil practice in the Eastern District of Virginia District Court are the Virginia Rules of Professional Conduct. E. D. Va. Rule 83.1 (I). Rule 4.1 of the Virginia Rules of Professional Conduct mandates that a lawyer not knowingly make false statements of law or fact. Rule 4.3 requires that attorneys not imply that they are disinterested parties when dealing with someone who is unrepresented by counsel and that they should make reasonable efforts to correct any misunderstanding regarding that fact. Rule 4.4 prohibits attorneys from purposely harming or burdening third parties or using methods of obtaining evidence that violate the legal rights of that person. Finally, Rule 8.4 (a) states that it is professional misconduct for any attorney to violate or attempt to violate any of the Rules of Professional Conduct.

As there are questions of both law and fact that are central to Defendant's Motion to Disqualify Plaintiff's Counsel, this Court will also remand this claim to the Fairfax County Circuit Court so the circuit court judge can make a determination on that issue in connection with the Plaintiff's Amended Bill of Complaint.

CONCLUSION

In conclusion, Plaintiff's Motion to Remand is granted because the fraud claim does not fall under the SLUSA preemption and consequently this court does not have subject matter jurisdiction over the claim. Plaintiff's filing of the Motion for Removal was timely. Defendant's Motion to Disqualify Counsel is also remanded to Fairfax County Circuit Court.

For the foregoing reasons, it is hereby ORDERED that the Plaintiff's Motion to Remand is GRANTED. This case is closed.

The clerk is directed to forward a copy of this order to counsel.

Entered this 24th day of January, 2005.

/s/ Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
01/24/05

APPENDIX C

Section 77p of Title 15 of the United States Code (2005) provides as follows:

§ 77p(b)

(b) Class action limitations. No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

§ 77p(c)

(c) Removal of covered class actions. Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

§ 77p(f)(2)-(3)

(f) Definitions. For purposes of this section, the following definitions shall apply:

(2) Covered class action.

(A) In general. The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of

individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions. Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members. For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction. Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security. The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) [15 USCS § 77r(b)] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any

debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2) [15 USCS § 77d(2)].

Section 78bb of Title 15 of the United States Code (2005) provides as follows:

§ 78bb(f)

(f) Limitations on remedies.

(1) Class action limitations. No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(2) Removal of covered class actions. Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

§ 78bb(f)(5)(B)

(5) Definitions. For purposes of this subsection, the following definitions shall apply:

(B) Covered class action. The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the

prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

APPENDIX D

Section 78u-4 of Title 15 of the United States Code (2005) provides as follows:

§ 78u-4 Private Securities Litigation

(b) Requirements for securities fraud actions

(1) Misleading statements and omissions in any private action arising under this chapter in which the plaintiff alleges that the defendant

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

Supreme Court, U.S.
FILED
OCT 3 - 2005
OFFICE OF THE CLERK

No. 05-289

IN THE

Supreme Court of the United States

TIMOTHY J. MILES,

Petitioner,

v.

H-QUOTIENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

PATRICIA ANN SMITH
LAW OFFICES OF PATRICIA A. SMITH
307 North Washington Street
Alexandria, VA 22314
(703) 548-3774

Counsel for Respondent

197045

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. Whether the district court erred in directing a remand of a tort case to State Court for lack of subject matter jurisdiction, and whether the Fourth Circuit erred in dismissing the appeal of the remand order pursuant to 28 U.S.C. § 1447(d), which states that a remand order based on lack of subject matter jurisdiction is not reviewable on appeal or otherwise. The Petitioner misrepresents the nature of the State Court action and misrepresents the action of the district court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent H-Quotient, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

The district court specifically found that it had no subject matter jurisdiction under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. § 77p, 78bb, and remanded the case to the State Court. 28 U.S.C. § 1447(d) specifically states that a remand order based on lack of subject matter jurisdiction is not reviewable on appeal or otherwise. There exists no split in the circuits concerning 28 U.S.C. § 1447(d), and there exists no split in the circuits concerning review under SLUSA where the district court finds lack of subject matter jurisdiction. Congressional preemption is not even implicated in this litigation where the district court determined there was no cognizable claim under SLUSA.

STATEMENT OF THE CASE

The Respondent, H-Quotient, Inc., filed its lawsuit against Timothy Miles in Fairfax County Circuit Court in Virginia seeking equitable, injunctive and other relief based upon common law allegations of fraud and misrepresentation. H-Quotient, Inc. filed its suit on behalf of itself and none other. After the Respondent filed an Amended Complaint nearly a year after the commencement of the litigation, the Petitioner-Defendant removed the case to the United States District Court for the Eastern District of Virginia. The case was assigned to the Honorable Gerald Bruce Lee.

H-Quotient, Inc. filed a motion to remand which the District Court granted on January 24, 2005.

Petitioner Miles claimed that H-Quotient's lawsuit sought damages for "'the corporate plaintiff, as well as its shareholders, creditors and others,' and that such claims were preempted in state court under SLUSA [Securities Litigation Uniform Standards Act]. Def. Not. Of Removal at 5; 15 U.S.C. § 77p(c)." District Court Order, Pet. Appendix B at 4a.

The District Court held "that it does not have subject matter jurisdiction over this claim under SLUSA." The Court further stated:

> In order to qualify as a "covered class action" under SLUSA and remove a State claim to Federal court, Plaintiff's complaint would have to be brought seeking damages on behalf of more than fifty persons with questions of law or fact common to those persons or one or more named parties would have to seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated. 15 U.S.C. § 77p(f)(2)(A)(i)(I-II). Plaintiff's complaint seeks no such collective remedy.

Order, *id.* at 5a. Since the lawsuit did not seek damages on behalf on any third party, the Court concluded, "the claim does not fall under SLUSA and this Court does not have subject matter jurisdiction." *Id.* at 6a.

The Petitioner filed his notice of appeal from this Order of remand of January 24, 2005. Petitioner subsequently filed a motion for reconsideration and for a stay in the district court. Both motions were denied, but notices of appeal were not filed as to these orders.

Respondent filed a motion to dismiss the appeal for lack of subject matter jurisdiction on April 4, 2005. The Fourth Circuit granted the motion by a one paragraph order entered June 8, 2005.

REASONS FOR DENYING THE PETITION

A REMAND ORDER FOR LACK OF JURISDICTION IS NOT REVIEWABLE ON APPEAL

An order remanding a matter to state court for lack of subject matter jurisdiction is not reviewable by appeal or mandamus. 28 U.S.C. § 1447(d). The statute is very specific in its terms:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 [civil rights proceedings] of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1447(d). This statute is construed as barring review of remand orders falling within Section 1447(c), which applies to remands due to defects in the removal and to remands for lack of subject matter jurisdiction. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-346 (1976).

In its Order, the District Court specifically stated that remand was due to lack of subject matter jurisdiction, bringing the matter fully within the circumstances of 28 U.S.C. § 1447(c). Therefore, appellate review is barred

as specified in section 1447(d). *See Severonickel v. Gaston Reymenants*, 115 F.3d 265, 269 (4th Cir. 1997) ("district court having remanded this case on the ground that it appeared to that court that it lacked subject matter jurisdiction, we are without jurisdiction over this appeal;" appeal dismissed for lack of appellate jurisdiction); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (if the district court invoked the grounds specified in § 1447(c), the order is unreviewable "even if it be manifestly, inarguably erroneous"). The fact that the Petitioner alleged jurisdiction under the Securities Litigation Uniform Standards Act under 15 U.S.C. § 77p does not alter the analysis because the District Court specifically found that SLUSA did not preempt the state court action and that the Respondent's complaint did not meet the requirements for federal jurisdiction stated in the SLUSA.

Every circuit appellate court considering the issue has held that remand orders based upon findings that SLUSA did not preempt a state court action, that removal based on SLUSA was improper or improvidently granted or that the district court did not have subject matter jurisdiction under Section 77p has also held that the remand order was subject to the bar of 28 U.S.C. § 1447(d) and not reviewable on appeal. *See Spielman v. Merrill Lynch, Pierce, Feder & Smith, Inc.*, 332 F.3d 116, 122 (2nd Cir. 2003) (remand order based upon perceived lack of subject matter jurisdiction is not reviewable on appeal); *United Investors Life Insurance Company v. Waddell & Reed, Inc.*, 360 F.3d 960, 966 (9th Cir. 2004) (discerned from the record that reasons for the remand was a perceived lack of subject matter jurisdiction; 1447(d) precludes review); *Williams v. AFC Enterprises, Inc.*, 389 F.3d 1185, 1189-1190 (11th Cir. 2004) (concluding that underlying basis for district court's remand

order was lack of removal jurisdiction, therefore review prohibited under Section 1447(d)).

The only appellate court that has reviewed a remand order based upon a Section 77p analysis was the Seventh Circuit in *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004). The Seventh Circuit reviewed that remand order only because the district court there had found that the action *was covered* by the SLUSA, and that the removal was proper. *Id.* at 848. However, the district court declined to exercise jurisdiction because Section 77p(b) did not thwart the plaintiff's litigation. *Id.* at 849-850. The Seventh Circuit concluded that since the district court had found the removal was proper, its order "is unaffected by Section 1447(d)." *Id.* at 851, relying upon *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988) and *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706, 712-713 (1966) (abstention based remand order is appealable; only remands based on grounds specified in Section 1447(c) are immune from review under Section 1447(d)).

The holding in *Kircher* is inapposite because the district court in the case at bar did not find that the removal was proper or that the action was covered by the SLUSA. In fact, the Court found directly to the opposite: that the SLUSA did not apply to the action and that it did not have subject matter jurisdiction. As a result, appellate review of the Order is barred by 28 U.S.C. § 1447(d). The Fourth Circuit was entirely correct in its Order dismissing the Petitioner's appeal.

Petitioner argues Congressional preemption as a basis for this Court to accept the case for review. But, Congressional preemption is not implicated in a situation such as this where there is no jurisdiction whatsoever under the federal statute, as the District Court found.

CONCLUSION

The district court remanded this action to the State court because "the Court does not have subject matter jurisdiction over the claim pursuant to section 77p of SLUSA." This remand order falls squarely within the bar of 28 U.S.C. § 1447(d). The remand order is not reviewable on appeal or otherwise, as the Fourth Circuit implicitly found. Therefore, Respondent prays that the petitioner for writ of certiorari be denied.

Respectfully submitted,

PATRICIA ANN SMITH
LAW OFFICES OF PATRICIA A. SMITH
307 North Washington Street
Alexandria, VA 22314
(703) 548-3774

Counsel for Respondent

Supreme Court, U.S.
FILED
OCT 13 2005
OFFICE OF THE CLERK

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REPLY BRIEF FOR THE PETITIONER

MICHAEL M. YORK
Counsel of Record
WEHNER & YORK, P.C.
11860 Sunrise Valley Drive
Suite 100
Reston, Virginia 20191
(703) 476-8000

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent's brief in opposition, while it focuses on the merits of the underlying issues, stands as an eloquent summary of why this Court should resolve the conflict among the circuits on the question of reviewability. The respondent has chosen to set forth its arguments on the soundness of the district court's remand order, but its brief demonstrates the purpose a grant of certiorari would accomplish. The issues contained in the respondent's brief would either be remanded for resolution by the court of appeals, or Congress would learn that the text of the Securities Litigation Uniform Standards Act (SLUSA), 15 U.S.C. § 77p, 78bb, must be augmented with additional language in order to effectuate its intention to completely preempt state-law securities fraud claims.

One issue in respondent's brief warrants a separate and specific response. Respondent states that petitioner misrepresented the nature of the state action, when in truth it is the respondent that has done so. Despite its protestations to the contrary in its brief, the respondent has characterized its fraud claim before the Fairfax Circuit Court as one based on the reliance of its shareholders and others. See Pet. 4. Without question, the nature of respondent's state law claim is in dispute, and the district court's evaluation of that dispute would be the subject for appellate review.

1. *The court of appeals' decision conflicts with decisions of another circuit.* Respondent incorrectly characterized the court of appeals' decision as it relates to the Seventh Circuit's ruling in *Kircher v. Putnam Funds Trust*, 373 F.3d 847 (7th Cir. 2004). In fact, respondent has mischaracterized *Kircher* itself. The Seventh Circuit determined that, in order to carry out Congress's intent, a district court's remand order under SLUSA must be reviewable by a federal court.[1] The Seventh Circuit went on to review, and reverse, the district court's ruling that SLUSA did not apply to that particular case. *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005) (*Kircher II*). Respondent has stated in its brief that "every circuit considering this issue has held that remand orders based upon findings that SLUSA did not preempt a state court action ... (was) not reviewable on appeal."
See 3 Brief in Opp. 4.

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[1] Two circuits have reached an opposite result. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004). This case arises from a final judgment of the Fourth Circuit dismissing the appeal on the respondent's motion asserting a lack of jurisdiction.

In truth, the Seventh Circuit in *Kircher* reached the opposite conclusion. It did so after the district court ruled that SLUSA did not apply, finding that the claimed fraud was not "in connection with the purchase or sale of a covered security." *Kircher v. Putnam Funds Trust*, 2004 U.S. Dist. LEXIS 10327 (S.D. Ill. Jan. 27, 2004).[2] In its opposition, respondent also incorrectly characterized the basis for the district court's ruling. See Brief in Opp. 5.

2. *The issue presented here is critically important to the nation's business community, and a review is necessary to effectuate Congress's intent to completely preempt certain class-action securities fraud claims.* The respondent chose not to reconcile the doctrine of complete federal preemption with the facts of this case, stating only that preemption "is not implicated" by the remand order. See Brief in Opp. 5. Such reasoning begs the question of whether Congress intended a district court's evaluation to be final and not reviewable by a federal court. Indeed, the Seventh Circuit concluded that such a remand is made pursuant to SLUSA and thus falls outside the scope of 28 U.S.C. § 1447(c).

3. *The respondent's attempt to distinguish the Seventh Circuit's decisions mischaracterizes those decisions.* Respondent points to an observation in *Kircher* that the district court held that removal was proper. Apparently, the respondent misunderstood the Seventh Circuit's observation that the district court "proceeded to question how 77p(b) affects the litigation." *Kircher*, at 849. Precisely the same could be said of the district court's actions in this case, as it proceeded to question how SLUSA affects the litigation. The

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[2] In addition, the Seventh Circuit reviewed and reversed a SLUSA remand order in *Disher v. Citigroup Global Markets, Inc.*, 2005 U.S. App. LEXIS 17334 (7th Cir. Aug. 17, 2005).

only distinction is that in *Kircher*, the district court determined that the claim did not involve a "covered security" as defined by SLUSA, where this case involves a district court's determination that the claim does not involve a "covered class action."

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

MICHAEL M. YORK
WEHNER & YORK, P.C.
11860 Sunrise Valley Drive
Suite 100
Reston, Virginia 20191
Telephone: (703) 476-8000
Facsimile: (703) 476-8300
Attorney for Petitioner

OCTOBER 2005